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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER

Appellant,

v.

VINCENT L. BRODERICK as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of Fuld, Ch. J., of the Court of Appeals of the State of New York, dated July 7, 1967 is the only opinion by any Court below. It is reported in 20 N. Y. 2d 227; —— N. E. 2d ——. The unofficial citation is not assigned or available at time of printing of this statement. A copy of the opinion is annexed hereto in the appendix.

Jurisdiction

Petitioner-Appellant was dismissed from his position as Patrolman in the New York City Police Department after a hearing on charges of misconduct that he did not waive immunity before a grand jury. A petition (pursuant to Article 78, Civil Practice Law & Rules) to the Supreme Court of the State of New York seeking reinstatement with back pay was dismissed by order of the Appellate Division of the Supreme Court of the State of New York, First Department, dated February 9, 1967, unanimously and without opinion (fol. 66).* Judgment was entered against the Petitioner-Appellant on March 2, 1967 in Supreme Court of the State of New York, County of New York (fols. 57-58). An appeal therefrom was taken on constitutional grounds that the statutory provisions requiring public officers to waive immunity before a grand jury were repugnant to the United States Constitution Amendments I, V and XIV, by Notice of Appeal dated February 23, 1967. The Court of Appeals unanimously affirmed and remitted the case to the Supreme Court of the State of New York, County of New York by order dated July 7, 1967 (fols. 64-67), and rendered an opinion by Fuld, Ch. J. (fols. 60-63). A Notice of Appeal to this Court was served and filed on August 1, 1967 (fols. 69-70). The jurisdiction of this Court to review is conferred by 28 USC §1257(2) in that there was drawn in question below the validity of Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter on the ground that they were repugnant to the Constitution of the United States and the decision was in favor of their validity. That jurisdiction exists in the circumstances of this case is sustained by the following decisions: *Torcaso* v. *Watkins,* 367 U. S. 488; *Adamson* v. *Cal.,* 332 U. S. 46; *King Mfg. Co.* v. *Augusta,* 277 U. S.

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* References are to pages of the certified record unless otherwise noted.

100; *Jamison* v. *Texas,* 318 U. S. 413, 414; *Independent Warehouses* v. *Scheele,* 331 U. S. 70, 79; *Poulos* v. *New Hampshire,* 345 U. S. 395, 402.

Statutes Involved

The texts of all sections of statutes are set forth in full in the appendix.

New York State Constitution, Article I, §6, *Manuel For The Use of The Legislature of the State of New York,* 1966-1967, p. 16 (John P. Lomenzo, Secretary of State, Albany, N. Y.); *McKinney's Laws of New York Annotated,* Book 2 Part 1, Constitution pp. 12-13 of 1967 Pocket Supplement (Edward Thompson Company, Brooklyn, N. Y.).

New York City Charter §1123, *New York City Charter and Administrative Code Annotated,* Vol. 1 p. 30 (Williams Press, Inc., Albany, N. Y. 1963).

Laws, 1940, Ch. 834, *Laws of the State of New York, 1940,* Ch. 834, p. 2098 (J. B. Lyon Co. Printers, Albany, N. Y., 1940); *McKinney's Laws of New York Annotated,* Book 65 Part 1, Unconsolidated Laws, Ch. 9, §891, p. 32 (Edward Thompson Co. Brooklyn, N. Y. 1949).

Civil Service Law §75(2), *Laws of the State of New York, 1960,* Ch. 312, p. 1165; *McKinney's Laws of New York Annotated,* Book 9, Civil Service Law, pp. 45-46 1967 Pocket Supplement (Edward Thompson Co. Brooklyn, N. Y.).

Question Presented

Is Article I, Section 6 of the New York State Constitution and is Section 1123 of the New York City Charter repugnant to the United States Constitution in that any

public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?

Statement

The Appellant was dismissed from his position of Patrolman in the New York City Police Department after a hearing on a charge of misconduct, said charge being that he did refuse to waive immunity before the New York Grand Jury. Appellant contends that such refusal is not an act of misconduct in that the provisions of law contained in the New York State Constitution and New York City Charter, requiring such waiver are unconstitutional. He seeks reinstatement with back pay on the grounds that he was never convicted by the department of any justicible act of misconduct as a prerequisite to dismissal and that by virtue of the dismissal he has been denied equal protection of the Laws and denied property without due process of law. A petition pursuant to Article 78, Civil Practice Law and Rules (CPLR) was brought in New York Supreme Court, County of New York. In the petition, paragraph "Sixth" (fol. 4) it was alleged that the appellant was deprived of equal protection of the laws and deprived of property without due process of law by virtue of his dismissal. After the Answer & Return was served, which document set forth the basis of the determination pursuant to which the petitioner was dismissed, to wit: refusal to waive immunity, as required by the New York State Constitution and New York City Charter (fols. 8, 9, 52), the appellant did serve his Reply thereto. In it he did allege in Paragraph "Second" that

the sections of law requiring the signing of a waiver of immunity were unconstitutional (fol. 56). The federal question was thereby raised by the pleadings. Moreover, the appeal to the Court of Appeals from the decision of the Appellate Division of the Supreme Court, First Department dismissing the petition, was on grounds that the sections of law requiring the waiver of immunity by public officers were repugnant to the United States Constitution, Amendments I, V and XIV (fol. 59). The resultant opinion of the Court of Appeals affirming the dismissal of the petition cited in the opinion that the appellant claimed "that he was dismissed solely for refusing to waive his privilege against self-incrimination and that it was unconstitutional for the Police Commissioner to discharge him on that ground" (fol. 60). The allegations of the pleadings, the questions presented on appeal to the Court of Appeals of the State of New York, and the recitation of the facts in the opinion of that Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. 28 U. S. C. 1257(2).

The Question Is Substantial

The federal question is substantial. The opinion of the Court of Appeals in this very case states, "Such provisions have been upheld in the past (citing case) and, *although the Supreme Court has indicated that the question may still be an open one* (see *Spevack* v. *Klein,* 385 U. S. 511, 516, n. 3; *Stevens* v. *Marks,* 383 U. S. 234, 243), we find no constitutional defect in the statute as it applies to this petitioner" (fol. 61). (Emphasis supplied.) Moreover, the question set forth in the notice of appeal to this court (fols. 69-70) is verbatim with the one upon

which certiorari was granted in *Stevens* v. *Marks,* 383 U. S. 234, in which case, this court stated, "Even were we to assume, without deciding, that a state may constitutionally exact on pain of loss of employment and in the absence of counsel, the waiver of a constitutional right, we would be unable to find any justification for denying the right to withdraw it." The protection of the Fifth Amendment applies through the Fourteenth Amendment to the States, *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The opinion of the Court below states that the testimony obtained from a public officer who signs a waiver of immunity upon pain of loss of employment may not be used against that public officer in a criminal proceeding, citing *Garrity* v. *New Jersey,* 385 U. S. 493 (1967). The Court, however states that the said testimony can be used in the administrative disciplinary hearing (fols. 61-62). The decision does not recognize that it is the testimony and the method of its attainment which has been characterized as compelled by *Garrity* v. *New Jersey.* Moreover since the state privilege and federal privilege have been merged by virtue of the doctrine of *Malloy* v. *Hogan,* the results of the benefit of the imposition of such privilege should be the same. Thus, in *Schlochower* v. *Board of Education,* 350 U. S. 551, the act of refusal to testify before a congressional committee was not an act of misconduct justifying dismissal by the state because the act was merely an exercise of a federally protected right. Since the right is now both federal and state in coverage, the act of this Appellant was no more an act of misconduct than that of Schlochower. See, also: *Steinberg* v. *United States,* 141 Ct. Cl. 1, 163 F. Supp. 590, cited with approval in *Sherbert* v. *Verner,* 374 U. S. 398, 404, n. 6. The opinion of the Court of Appeals also deprives the Appellant of equal protection of the laws, in that the New York State Legis-

lature has specifically stated that a police officer can only be dismissed after a hearing on stated charges with a right to counsel and with the burden of proving the misconduct to be on the party alleging same. *Laws, 1940,* Ch. 834. By compelling the Appellant who was then under departmental charges encompassing the same area of the grand jury inquiry (fols. 68, 60, 19, 27, 32, 44-45) to testify, and then by allowing said testimony to be used against him in the departmental hearing, as suggested by the opinion, the burden of proof of misconduct would be shifted to the Appellant, while all other officers of his class enjoyed the legislative protection of requiring the department to prove the acts of misconduct. The Legislature has required the party alleging misconduct to prove it in the cited statute and also generally by *Civil Service Law* §75(2). The Court of Appeals has in effect repealed these sections by the opinion. Moreover, a Civil Service Employee need not testify at his own removal hearing. *Schawecker* v. *Green,* 96 App. Div. 249, 254 (1st Dep't 1904). The opinion would seem to overrule this long standing doctrine, and shift the burden of proving misconduct upon the accused and from the party alleging it. This runs contrary to basic precepts of due process of law. The federal question is substantial. It is the question of loss of employment by a public officer unless he waives a constitutionally protected right, which will lead to testimony already characterized by this Court as compelled, which testimony can be used against him. The question is of such substantial importance that it requires plenary consideration with briefs on the merits and oral argument for its resolution. Is the refusal to waive a constitutional privilege under threat of loss of employment an act of misconduct justifying dismissal of a public officer? Every public officer is privy to the resolution of

this question. The question is not confined to New York State public officers, since many other states have similar laws requiring the waiver of immunity upon pain of loss of office. See e.g.: *N. J. Rev. Stat.* §2A:81-17 (Supp. 1965); *Cal. Government Code* §1028.1; *La. Const.* Art. XIV §15 (P) (1).

CONCLUSION

It is respectfully submitted that the court should note probable jurisdiction of this appeal.

Dated: New York, N. Y.,
September 13, 1967.

RICHARD GUGLIOTTA,
Attorney for Appellant

APPENDIX

Opinion of Fuld, Ch. J.

New York Court of Appeals, July 7, 1967, reported in 20 N. Y. 2d 227, being the only opinion in this case (fols. 60-63).

FULD, Ch. J.

In this article 78 proceeding, the petitioner seeks reinstatement as a patrolman in the New York City Police Department, claiming that he was dismissed solely for refusing to waive his privilege against self-incrimination and that it was unconstitutional for the Police Commissioner to discharge him on that ground. In August of 1965, a New York County Grand Jury was investigating accusations of bribery and corruption of police officers in connection with illicit gambling operations. The petitioner, then under departmental charges, was subpoenaed to appear before the grand jury. After being advised of the investigation and that the grand jury desired to question him concerning the performance of his official duties, he was requested to sign a limited waiver of immunity—"to waive immunity from prosecution" for any misconduct in office disclosed by his testimony—as provided in section 1123 of the New York City Charter. (See, also, N. Y. Const., art. I, §6.)[1] The petitioner was also

[1] Section 1123 of the City Charter provides, in part, that, if any employee of the City "shall * * * wilfully refuse or fail to appear before * * * any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding * * * official conduct of any officer or employee of the city or of any * * * county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant."

(footnote continued on next page)

informed that, under both the Charter and the Constitution, he was required to sign the waiver and that, if he refused to do so, he would be discharged from his position as a police officer. He refused to execute the waiver and, following an administrative hearing, was dismissed from the force.

It is clear, and was so understood by the petitioner, that section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination and to answer questions regarding the conduct of his office and the performance of his official duties. Such provisions have been upheld in the past (see, e.g., *Nelson* v. *Los Angeles County*, 362 U. S. 1) and, although the Supreme Court has indicated that the question may still be an open one (see *Spevack* v. *Klein*, 385 U. S. 511, 516, n. 3; *Stevens* v. *Marks*, 383 U. S. 234, 243), we find no constitutional defect in the statute as it applies to this petitioner.

In *Garrity* v. *New Jersey* (385 U. S. 493), the Supreme Court, deciding that the government may not use "the threat of discharge to secure incriminating evidence" against a public employee, held that a police officer could not be compelled to waive his constitutional privilege against self-incrimination by threats that he would other-

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(footnote continued from previous page)

And section 6 of article I of the State Constitution declares, insofar as relevant, that "No person shall * * * be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his * * * office * * * or the performance of his official duties * * *, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, * * * be removed from his * * * office by the appropriate authority."

wise be removed from office. The testimony obtained under such circumstances was ruled to be inadmissible in subsequent criminal proceedings brought against him. This decision undoubtedly had the effect of partially invalidating section 1123 of the New York City Charter as well as section 6 of article I of the New York Constitution. But nothing decided in the *Garrity* case bears on the issue in the present case. If the petitioner before us had executed the waiver required by section 1123 and then testified about misconduct in office, his testimony, though inadmissible in a criminal prosecution, would, nevertheless, have furnished sufficient cause to justify his dismissal from the police force. (Cf. *Ullman* v. *United States*, 350 U. S. 422, 430-431.)

In point of fact, the petitioner did not execute the waiver and stood on his constitutional privilege against self-incrimination when notified that he was to be questioned about malfeasance as a police officer. Such information patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal. His refusal to speak on the subject constituted "employee insubordination for failure to give information which * * * the State has a legitimate interest in securing" (*Nelson* v. *Los Angeles County*, 362 U. S. 1, 7, *supra*; see *Spevack* v. *Klein*, 385 U. S. 511, 519, *supra* [*per* Fortas, J., concurring]), and, consequently, he was properly dismissed from the police force. (See *Canteline* v. *McClellan*, 282 N. Y. 166; *Christal* v. *Police Com. of San Francisco*, 33 Cal. App. 2d 564; *Cunningham* v. *Civil Service Com'n*, 48 Hawaii 278; *Fallon* v. *New Orleans Police Department*, 238 La. 531; *Souder* v. *Philadelphia*, 305 Pa. 1.) Although people in public office and on the public payroll may not be compelled to surrender their constitutional privilege against self-incrimination (see *Garrity* v. *New Jersey*, 385 U. S. 493,

supra), they have no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties.

In *Spevack* v. *Klein* (385 U. S. 511, *supra*), the Supreme Court held that an attorney could not be compelled, upon pain of disbarment, to waive his privilege against self-incrimination and testify about his professional conduct. (See, also, *Matter of Cohen,* 7 N Y 2d 488, 498 [dissenting opinion].) However, a lawyer, though licensed by the State—like a doctor, barber or chauffeur—is not, as Mr. Justice Fortas pointed out in his concurring opinion in the *Spevack case* (385 U. S., at p. 520), "an employee of the State. He does not have the responsibility of an employee to account to the State for his actions." The petitioner, however, did have such a responsibility and his refusal to carry out that responsibility rendered him subject to removal from his position of public trust and confidence.

The order appealed from should be affirmed, without costs.

* * *

Order affirmed, without costs. Opinion by Fuld, Ch. J. All concur.

New York State Constitution, Article I, §6

New York State Constitution, Article I, §6, reads,

[Grand jury; protection of certain enumerated rights; duty of public officers to sign waiver of immunity and give testimony; penalty for refusal.] §6. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the con-

sent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 8, 1949; November 3, 1959.)

New York City Charter, §1123

New York City Charter, §1123 reads,

§1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (Derived from former §903.)

Laws, 1940, Ch. 834

Laws, 1940, Ch. 834 reads:

Section 1. Removal of policemen serving in the competitive class of civil service in the several cities, counties, towns and villages of the state. A policeman serving in the competitive class of civil service in any city, county, town or village of the state, any provision of law, rule or regulation to the contrary notwithstanding, shall not be removed from his position except for incompetency or misconduct shown after a hearing upon due notice upon

stated charges, and with the right to such policeman to be represented by counsel at such hearing and to a judicial review in accordance with the provisions of article seventy-eight of the civil practice act. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Hearings upon charges pursuant to this act shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.

§2. This act shall take effect immediately.

Civil Service Law §75(2)

Civil Service Law §75(2) reads:

Section 1. Subdivision two of section seventy-five of the civil service law, as added by chapter seven hundred ninety of the laws of nineteen hundred fifty-eight, is hereby amended to read as follows:

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy

or other [employee of] *person designated by* such officer or body [designated] in writing for that purpose. In case a deputy or other [employee] *person* is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

§2. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.